

TRANSPORTATION REPORT

From: Terry Whiteside

To: Montana Wheat & Barley Committee

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STB Rules In Important Cargill vs BNSF Fuel Surcharge Case - An Important Case

For Background: The BNSF and the other six major Class I railroads in the United States - utilize a fuel surcharge system to collect fuel costs over and above \$1.25/gallon (moved to \$2.50/gallon on 01-01-2011). The fuel surcharge are calculated by taking the fuel surcharge/mile published by the railroad and multiplying that by the number of miles a shipment travels on the railroad. This fuel surcharge amount is then added to a 'base' rate to arrive at the total charge for the movement. The railroads also collect fuel costs inside their base rates - and the theory is that this fuel cost is the fuel costs 'below' what is known as the strike price. The rub with a number of shippers is that the fuel surcharge costs are excessive - and result in over collecting hundreds of millions of dollars. Some economists have found that the fuel surcharges alone collect more in fuel charges than the railroads entire total fuel bill. So this case filed by Cargill challenging the fuel surcharges collected by a Class I railroad (in this case the BSNF) is important because it may be a landmark case in the overall legality of the fuel surcharge collection amounts. ***We, in this Transportation Report, have tried to boil down the essence of this case for easier reading and understanding.***

On April 19, 2010, Cargill, Incorporated (Cargill), filed a complaint under 49 U.S.C. § 11701(b), challenging fuel surcharges collected by BNSF Railway Company (BNSF) as an unreasonable practice under 49 U.S.C. § 10702(2). Cargill requests that the Board: (1) find

the surcharge practices to be unreasonable and order BNSF to cease and desist from such practices; (2) prescribe reasonable fuel surcharge practices; and (3) under 49 U.S.C. § 11704(b), award monetary damages with interest for all unlawful fuel surcharge payments made. Typically, the BNSF filed Motions to Dismiss all of the Complaint. In this decision, the STB granted in part and denied in part BNSF's motion to dismiss portions of the complaint and issuing a procedural schedule. **Summary - Cargill will be able to continue this complaint against the unreasonableness of fuel surcharges being collected by the BNSF.** The tight wire the STB is walking here is to examine the fuel surcharges and how they are collected without ruling on the reasonableness of the overall rates that occur due to the application of the 'base' rate and the 'fuel surcharges' added to the rate.

Many shippers continue to assail the level of fuel charges being charged inside the rail rates created when the railroads collecting fuel charges inside the base rate and then adding a fuel surcharge to the base rate. **Fuel surcharges by their definition are to recover fuel charges over and above the fuel collected inside the base rates.** Many shippers and the railroads themselves tout the fuel surcharges as an individual revenue or profit center - in fact when the fuel prices fell after April, 2008, the railroads reported to Wall Street that one of the major reasons for decreased revenues by the railroads was that the fuel surcharges had fallen. If these fuel surcharges are truly for 'excess' fuel charges - it is difficult to reconcile the use of the term 'profit' from fuel surcharges when they supposedly designed for the collection of increases in fuel expenses.

In Fuel Surcharges Proposed, EP (Ex Parte) 661 (STB served Aug. 3, 2006), the Board (STB) sought comment on specific proposals to require that rail fuel surcharges "be tied not to the level of the base rate but to those attributes of a movement that directly affect the amount of fuel consumed," such as mileage or mileage and weight. The Board also addressed "double dipping," described as "charging for the same increases in fuel costs for the same shipment both through a fuel surcharge and through application of a rate escalator that is based on an index such as the Board's Railroad Cost Adjustment Factor (RCAF) without first subtracting out any fuel cost component from that index."

Cargill has now brought this case - the second major complaint challenging a specific rail fuel surcharge program under the Board's fuel surcharge rules¹. Cargill is an international producer and marketer of food, agricultural, financial, and industrial products and services. It ships various agricultural and other commodities over BNSF in common carrier service under a number of BNSF pricing authorities.

Cargill claims the surcharge is an unreasonable practice because: (1) the general formula "bears no reasonable nexus to, and overstates, the fuel consumption" for the relevant traffic; (2) BNSF uses the surcharge to "extract substantial profits over and above its incremental fuel costs for the BNSF system traffic to which the surcharge is applied;" and (3) BNSF is "double recovering the same incremental fuel cost increases BNSF has incurred in providing service to Cargill by (i) setting its base rates on Cargill traffic to include recovery of fuel prices higher than the BNSF fuel strike price of \$0.73 per gallon implicit in the [fuel surcharge] and (ii) by increasing the Cargill base rates (including the fuel component in the base rates) [while] requiring Cargill to pay . . . the fuel surcharge."

BNSF as previously stated, filed motions to dismiss on all parts of the complaint and to the entire complaint. In recent times, this is a standard for BNSF - to file motions to dismiss in virtually all complaints filed against it.

At the STB, Motions to Dismiss are disfavored and rarely granted. Under 49 U.S.C. § 11701(b), the Board may dismiss a complaint that "does not state reasonable grounds for investigation and action." In ruling on motions to dismiss, the Board assumes that all factors be viewed in the light most favorable to the complainant, including all factual allegations. AEP Texas North Co. v. Burlington Northern and Santa Fe Ry., NOR 41191 (Sub-No. 1), slip op. at 2 (STB served Mar. 19, 2004).

¹ The first application of the Board's fuel surcharge rules occurred in Dairy land Power Coop. v. Union Pac. R.R. (Dairy land), NOR 42105 (STB served July 29, 2008).

The STB being careful here, has decided to not grant the BNSF's motions to dismiss at this time with the exception of the Double Recovery Claim. "We find that Cargill's Profit Center claim offers a reasonable basis for further Board consideration, and we will therefore deny BNSF's request to dismiss it. We will also deny as premature BNSF's motion to dismiss Cargill's request for damages with interest. We will, however, grant BNSF's motion to dismiss Cargill's Double Recovery claim. "

This leaves the complaint virtually intact for resolution, and Cargill's claim (one echoed by many shippers including agricultural producers and merchandisers), that BNSF uses this fuel surcharge "to extract substantial profits over and above its incremental fuel costs for the BNSF system traffic to which the surcharge is applied."